United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7463

United States Court of Appeals

FOR THE SECOND CIRCUIT

FOOTNER & CO., INC., *et al.*,

Plaintiffs,

against

SS AMAZONIA, her engines, etc. COMPANHIA DE NAVEGACAO MARITIMA NETUMAR, *et al.*,

Defendant-Appellant and Third-Party Plaintiff,

and against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Third-Party Defendant-Appellee.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,

Plaintiff-Appellant,

against

UNITED TERMINALS, INC.,

Defendant,

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant-Appellee.

BRIEF FOR APPELLEE NEW JERSEY EXPORT MARINE CARPENTERS, INC.

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TABLE OF CONTENTS

Cases Cited

PAGE

Rules Cited

Other Authority Cited

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Defendant-Appellee.

BRIEF FOR APPELLEE NEW JERSEY EXPORT MARINE CARPENTERS, INC.

Statement of the Case

This is an appeal from so much of a judgment of Judge Owen entered on August 20, 1976 which dismissed the complaint and third-party complaint of Companhia de Nave-

gacao Maritima Netumar ("Netumar") against New Jersey Export Marine Carpenters, Inc. ("Export").

This consolidated proceeding was brought to recover damages sustained to cargo and to the hull of the M/V Amazonia owned and operated by appellant, Netumar.

Civil Action 72-2402 was brought by plaintiffs, Footner, et al, against the Amazonia and Netumar for loss and damage to various shipments carried by the vessel. Netumar filed a third-party complaint against United Terminals, Inc. ("United") and Export to recover indemnity for the alleged cargo damage and loss and also to recover damages sustained by the vessel, including loss of use. The plaintiffs amended their complaint to assert a cause of action directly against the third-party defendants, United and Export. Thereafter, Netumar compromised the plaintiffs claims in the sum of $138,981.00 and continued the action against United and Export.

Civil Action 74-438 was brought by Netumar against United and Export directly alleging negligence and the breach of warranty on the part of United in the performance of its duties as stevedore and Export as marine carpenters and lashers of the cargoes which were carried aboard the Amazonia. The action sought to recover a total of $276,872.10 for claims which Netumar settled with owners of other shipments aboard the vessel which owners had sued Netumar in two related actions, i.e. *Centro Technico de Aeronautica, et al.* v. *SS Amazonia* (72 Civ. 111) and *Sperry Rand, et al.* v. *SS Amazonia* (72 Civ. 386).

The two actions were consolidated by order of Judge Owen dated August 13, 1975. Trial, on the issue of liability only (Tr. 3)*, commenced on January 19, 1976 and the

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* Unless otherwise indicated, numerals in parentheses preceded by "A" indicate pages in the joint appendix, and numerals in parentheses preceded by "Tr." indicate pages in the trial transcript.

taking of all evidence was concluded on January 26, 1976. The actions against United were dismissed at the end of Netumar's case (Tr. 481) and United is not a party to this appeal.

The issues before the trial court were whether Export performed its services of securing certain heavy machinery laden aboard the vessel safely and properly, in accordance with reasonable standards of the trade and whether the securing of the cargo played any role in the casualty suffered by the vessel en route to Brazil when the machinery broke adrift puncturing the vessel's hull.*

Judge Owen, in his opinion dated July 22, 1976, made the following findings:

> ". . . I find that the tractors were properly lashed, with suitable materials, by Export in New York. I find that this lashing was checked by a representative of the vessel owner, National Cargo Bureau, Inc., and a certificate given confirming the propriety of the said lashings." (A7)
>
> * * *
>
> "On this record I conclude that it is impossible to tell why the Terex broke loose. . . . the Amazonia has not met its burden of proving the cause of the terexes getting loose and one of them puncturing the side of the vessel. That, coupled with my finding that the Terexes were properly lashed, is dispositive of the issues herein." (A8-9)

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* Throughout its brief, appellant erroneously contends that appellee was responsible for stowage (Appellant's brief, pp. 2, 14, 23). The stevedore, United, was responsible for stowage. Export, the lasher, was responsible only for securing the cargo.

General Factual Background

The Amazonia, a diesel powered motor vessel, registered under the Brazilian flag, was operated by Netumar in a liner service between East Coast ports of South America, United States and Canada.

The vessel arrived in New York on January 14, 1971 and docked at Pier 36, East River to complete final loading for her southbound voyage to Brazil. Prior to calling at New York, the vessel had stopped to load and discharge cargo at: Jacksonville, Baltimore, New York, St. John (Canada), Baltimore and Philadelphia.

Securing of certain heavy machinery loaded at New York was performed by Export pursuant to an oral agreement with Netumar. The vessel had, during her service since construction, carried a considerable quantity of heavy lift cargo between New York and Brazilian ports. A Netumar representative estimated that 85% of the cargo carried in this trade was heavy lift cargo.*

The cargo loaded at New York included two Terex tractors which were designed for use as earth movers. They were mounted on four rubber wheels fitted with pneumatic tires. Each tractor weighed 17 short tons and measured 18.7′ x 12′ x 13.7′.

United, the stevedore, placed the tractors in the No. 2 tween deck compartment of the vessel so that they would be readily accessible for discharge at Recife, the vessel's first port of call. The tractors were stowed athwartship due to the fact that other cargo loaded at prior ports in the No. 2 tween deck left insufficient room for fore and aft stowage (A44-45, 47, 171).

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* A heavy lift is any unit of cargo in excess of five tons (Tr. 89).

After the tractors were stowed, Export's employees undertook the work of securing them for the sea passage. This was done under the supervision of Alphonse D'Ambrosio, Export's foreman (A164-165). After the completion of the work, it was inspected by a National Cargo Bureau surveyor on behalf of the ship (A96) and by the vessel's chief officer, neither of whom made any criticism of the method of securing or lashing (A77-79, 97).

The vessel sailed from New York at approximately 2125 hours on January 18, 1971. The voyage was uneventful until approximately 2100 hours on January 19th. At this time, there was an increase in wind and sea conditions (Exh. 16, p. 113).* The weather and sea continued to build causing the vessel to roll and pitch heavily through the 20th of January. At 2200 hours on the 20th, the vessel's crew discovered flooding in the No. 2 hold (A51-55).

The vessel proceeded to Bermuda as a port of refuge where it arrived at approximately 1400 hours on January 21st. Shortly after arrival, various surveyors examined the condition of the vessel and its cargo and found extensive damage to the cargo in all compartments. Sea water had entered No. 2 hold through punctures in the vessel's shell plating on the starboard side just above the tween deck level. The punctures were caused by arms protruding from the front end of the tractor stowed on the starboard side of the compartment. The arms were intended to support buckets which had been removed for shipment and separately stowed (A11; Exh. 98).

Issues Presented

1. Whether the Court's finding that Appellant failed to prove the cause of the casualty was clearly erroneous?

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* Annex I, infra.

2. Whether the Court's finding that the tractors were properly lashed with suitable materials by Appellee was clearly erroneous?

ARGUMENT

POINT I

The Trial Court made factual findings, based upon substantial evidence, which are not clearly erroneous.

Under Point I of its brief, appellant is critical of the court's opinion in that "it failed and neglected to make the findings and conclusions required by Rule 52(a) of the Federal Rules of Civil Procedure."

We submit that such criticism is unfair and specious. The court's opinion does, indeed, set forth its findings and conclusions, succinctly and directly pointed to the heart of the issues before it, (see p. 3, *supra*) and in conformity with Rule 52(a).

A. The Court's opinion is in conformity with Rule 52(a)

In 1946, Rule 52(a) was amended to include the following language:

> "If an opinion or memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein."

In Moore's Federal Practice, Volume 5A, page 2607, the author quotes from the Committee Note of 1946 to Subdivision (a) as follows:

> "These findings should represent the judge's own determination and not the long, often argumentative

> statements of successful counsel. * * * Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately * * * but the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for overelaboration of detail or particularization of facts."

The Rule further provides that these findings shall not be set aside "unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *McAllister* v. *United States,* 348 U.S. 19 (1954). In fact, several of the circuit courts of appeal have interpolated the rule so as to bar appellate review of the fact-finder's determination of credibility. *Government of Virgin Islands* v. *Gereau,* (3d Cir. 1974), 502 F.2d 914, 921, cert. denied, 420 U.S. 909.

B. The Court's findings are based upon substantial evidence and are not clearly erroneous

The court's findings are not clearly erroneous and do not pertain to "minor matters", as appellant contends, but to the substantive issues which were contested. The findings and substantial evidence on which they are based are discussed *infra,* pp. 10-16.

As Judge Learned Hand pointed out in *United States* v. *Aluminum Company of America,* (2nd Cir. 1945), 148 F.2d 416, 433:

> "It is idle to try to define the meaning of the phrase 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the findings of a judge than that of an administrative tribunal or of a jury, will

> nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. * * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.'"

The trial court, in the instant case, heard the testimony of 16 live witnesses and had the opportunity to view their demeanor. Insofar as the court's findings are based upon a resolution of any conflict in the testimony of such witnesses, its findings must be treated as unassailable.

POINT II

Appellant had the burden of proof and failed to meet it.

A marine contractor is liable to indemnify a shipowner if the facts demonstrate that it failed to perform its services properly and safely and that such failure proximately caused an injury which casts the shipowner in damages. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Company, Inc.*, 376 U.S. 315 (1964).

Therefore, in the case at bar, appellant was required to factually demonstrate improper and unsafe performance

on the part of Export with respect to the securing of the tractors and that such impropriety was the proximate cause of the casualty on the voyage of the Amazonia. *Master Shipping Agency, Inc.* v. *M/S Farida* (not officially reported), 1976 A.M.C.91, 107 (S.D.N.Y.); *Reddick* v. *McAllister Lighterage Line, Inc.*, 258 F.2d 297 (2nd Cir. 1958); *In re F/V Stanford Morse*, 406 F.Supp. 820 (D.C. Miss. 1976).

In *Pacific Far East Line, Inc.* v. *Jones Stevedoring Co.*, 346 F.2d 642 (9th Cir. 1965), the court stated, at p. 644:

> "We agree with appellant's interpretation of the applicable legal principles. Adequate proof of an unworkmanlike performance by appellee in the use of the ladder in question would entitle appellant to indemnification for breach of implied warranty but fatal to appellant's cause is the inescapable fact that the evidence in the record does not sufficiently support appellant's construction of the relevant facts."

This is precisely the state of the record in this case. Liability under a warranty of workmanlike service does not arise in a factual vacuum. It must be predicated upon evidence which establishes that the marine contractor failed in some manner to perform his service safely and properly or was negligent and that such improper performance or negligence was the proximate cause of the damage or injury. In the instant case, appellant failed on both counts. Judge Owen found that Export had properly lashed the tractors with suitable materials (A7) and, thus, Export was guilty of neither improper performance or negligence. Further, Judge Owen found that it was impossible to tell what caused the tractors to come adrift. *Any number of things could have happened* (A8). Thus, appellant failed to establish the proximate cause.

A. Export properly lashed the tractors with suitable materials

The court made the affirmative finding that Export had performed properly. Appellee's carpenter/lashing foreman, Mr. D'Ambrosio, was the only eye-witness who testified to the complete securing operation at New York. He was questioned at length as to the materials employed and the manner in which the tractors were secured (A165-191, 207-208). His recollection was clear and precise (A179-180, 204-205). Obviously, the court accepted his testimony over that of witnesses who were not present. D'Ambrosio's description of the manner and method used in securing the tractors was confirmed as proper by appellee's trial expert, Captain Wheeler (A228-230).

Appellant contends that "the only evidence cited to support a finding that the tractors had been properly lashed was the National Cargo Bureau certificate" (Appellant's brief, p. 12). This contention, however, ignores the testimony of D'Ambrosio, the expert testimony of Captain Wheeler, and the fact that the vessel's officers approved the security.

Nowhere in Judge Owen's opinion does he state that his finding that the tractors were properly lashed was based *solely* on the National Cargo Bureau certificate. It is obvious that the reference to the certificate in Judge Owen's opinion was cited as supportive and confirmatory of the propriety of the lashing as described by D'Ambrosio.

The National Cargo Bureau representative testified that the job of the Bureau is "to assist the mate and the Master of the vessel to see that the cargo is properly secured" (A199). National Cargo Bureau issued two certificates on behalf of the vessel. Certificate S28451 was issued for specific cargo on deck (A95). Certificate A69957 was

issued for cargo stowed under deck (A96, 194). The A certificate refers to unboxed tractors. The certificate was cautiously worded so as to exclude cargo which was not sighted, e.g., "containers (contents not sighted)". The Bureau witness who testified to these certificates stated that the practice for issuing an A certificate is to look at the *entire under deck cargo* (A200).

Comparison of the A and S certificates (A95-96) with the surveyor's working notes or "certificate authorization sheets" (A97-98) clearly demonstrates that the surveyor made both an on-deck and under-deck inspection of the cargo and that the latter included inspection of unboxed tractors and their buckets.

In a footnote following this finding (A7-8), the court makes note of appellant's attempt to avoid the impact of the National Cargo Bureau certificate. Appellant argues that the inspector could not have examined the tractors because the hatch was closed, thus preventing access to the tween deck compartment (Appellant's brief, pp. 12-13). The court counters this contention with the observation that if the crew, some 18 hours out of port, had the opportunity to inspect the lashings below deck, then certainly the National Cargo Bureau's inspector had the same access to the cargo compartments prior to the vessel's departure from New York. Additionally, the security of the tractors was inspected by the chief mate and boatswain before the vessel left New York. This inspection took place while the lashers were still present in the hold, having completed their work and submitted it to the vessel for approval. The mate voiced no dissatisfaction (A78-79, 189, 210-211). The work was approved by the vessel.

B. Appellant failed to establish proximate cause

Despite 790 pages of trial transcript representing the testimony of 16 live witnesses and 108 exhibits, the court

found that "it is impossible to tell why the Terex broke loose. Any number of things could have happened."* Therefore, the court concluded that, "In any event, the Amazonia has not met its burden of proving the cause of the Terexes getting loose and one of them puncturing the side of the vessel" (A8-9).

In sifting through the evidence, the court made several other findings. Appellant urges that these relate to "minor matters". However, they are of extreme importance inasmuch as they provide an insight to the fact finder's difficulty in determining exactly what caused the casualty.

It found that the chief mate in charge of the cargo was ill and unable to effectively attend to his duties (A7, footnote 3). The mate's responsibility to maintain the security of the cargo was critical in the face of storm warnings, heavy rolling and the navigational difficulties apparently encountered by the vessel during the voyage. In his End of Voyage Report, the Master reported that the chief officer's "strength failed when it was required" (A90). There is no evidence in the record to indicate when his strength was required but, obviously, it referred to some emergency aboard the vessel on its voyage between New York and Bermuda.

The vessel's first cargo inspection during the voyage occurred 18 hours after leaving New York. Thereafter, the vessel did not undertake another inspection until *26 hours later* despite experiencing some of her heaviest

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* Although not commented on in Judge Owen's Opinion, there was evidence that certain padeyes or staples which were welded to the vessel's frames had broken or parted in No. 2 tween deck compartment (A13-14). Appellant's surveyor who examined the vessel at Bermuda conceded that these padeyes to which the tractors were lashed may have parted first (A41).

weather and extreme rolling.* Appellant's own expert witnesses testified to the necessity of tightening the turnbuckles because wire lashings have a tendency to stretch or "grow", especially when the vessel is rolling vigorously (A126-128, 130, 155-156); see *Farina, supra, pp. 97-98.*

The trial court found substantial evidence to indicate that there was a fire on the vessel. It noted that the Master's End of Voyage Report criticized the absence of fire fighting skills among his crew (A8, footnote 6; A91-92). Furthermore, the engine room log noted that early on the morning of January 20th, the fire pump was started in operation together with the ballast and bilge pumps, pumping out hold No. 2 (A88). There was other physical evidence that a fire had occurred, e.g., a severely charred gasket on a door leading into a deck resistor house; strung out fire hoses in the same vicinity; stained and flaked areas on the resistor house bulkhead; and vessel maneuvers indicating an attempt to find a lee to fight the fire in the early hours of January 20th.

Judge Owen found, upon conflicting evidence, that when the vessel departed from New York its weight was improperly distributed, thereby making it a "stiff ship", which aggravated the shifting of any cargo in the vessel (A7, footnote 4). The conflict might have been resolved if the appellant had produced, pursuant to appellee's pretrial request, the chief mate's stability calculations. They were never produced, nor was any explanation offered for their non-production.

The trial court further found that either the fighting of the fire or the problems of the management of the vessel in heavy seas was such as to make the entire crew, includ-

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* The vessel's deck log and radiograms conflict and raise doubt as to whether this inspection was, in fact, conducted.

ing the engine room staff, pay no attention to the pounding of the tractor on the starboard shell (A8).

This pounding, which ultimately resulted in puncturing the shell plating of the vessel, should have been heard, especially by the vessel's engineers (A159-161, 236). Nevertheless, there is no record in any of the ship's documents to indicate that fact. Significantly, the master was critical of the lack of training of the engine room officers "in a situation of danger" (A89).

Appellant contends, at page 14 of its brief, that Export restowed part of the paper in the No. 2 tween deck in New York.* *Fifteen* tons** of newsprint were restowed at New York from No. 1 to No. 2 hold on the square of the hatch in the *after end* of the tween deck. Forward of the restowed paper and also on the square of the hatch were cases of machinery. Forward of the cases and surrounding them and the 15 tons of restowed newsprint was the bulk of the newsprint consisting of 250 tons which had been loaded and secured at a prior port (A17). The forward face of the 250 tons extended completely across the width of the compartment at its forward end secured by a fence. Forward of the fence, or cribbing, the tractors were placed and it was against this fence that Export braced its lumber in securing them.

To the extent that any rolls of newsprint may have come adrift first, the testimony was directed to the rolls at the forward face of the 250 tons which may have toppled over, knocking out the fence and the bracings securing the cribbing of the tractors and destroying the integrity of their security system (A147-148, 234-235).

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* This is erroneous. Appellee was not responsible for the stowage of any cargo aboard the vessel.

** Not 65 tons, as appellant contends.

Appellant did not and could not offer any evidence in support of its contention that Export was responsible for the securing or lashing of the 15 tons of restowed newsprint.

The evidence presented by appellant as to the events of the voyage once the vessel left New York revealed a hopelessly conflicting sequence. The master and boatswain, the only fact witnesses produced by the vessel, did not testify at the trial. As revealed in their deposition testimony (Exhs. 69 and 70), their stories conflicted with the vessel's documents. Furthermore, the vessel's records, including the engine log (Exh. 17, Exh. 88), the deck log (Exh. 16, Exh. 87), the radiograms (Exh. 90), and the master's End of Voyage Report (Exh. 89) only compounded the confusion by revealing conflicts *inter se*. Some highlights follow:

: At 0108 on January 20th, the engine log reports, "the fire pump was started in operation together with the ballast and bilge pumps, pumping out hold No. 2" (A88). No similar entry is contained in the deck log despite the fact that the order to activate the pumps would originate from the vessel's navigating bridge (A59).

: During the midnight to 0400 hours watch on January 20th, the engine room log shows a decrease in shaft revolutions (A88). Yet, in that period, according to the deck log, the vessel was not encountering weather which would justify such reductions in speed (A12).

: The vessel's radio message No. 24 indicates that at 1615 hours, ship's time, on January 20th, the cargo was "out of place" (Exh. 69, p. 184).* There is no entry in the deck log of any inspection that would have revealed this fact. In fact, there is an entry

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* Annex IV, infra.

at 1800 that an inspection of holds 1, 2 and 3 revealed nothing abnormal or out of order (Exh. 87, p. 92).* Furthermore, the same radio message reports weather "tending to improve". According to the deck log, the weather was worsening (A12).

: The deck log and Captain Serra report that at 2200 on January 20th, the ship *suddenly* began to list very heavily (A51-52). In contradiction, the vessel's radiograms report a list as early as 1615 hours ship's time (A60-61), increasing at 1700 hours ship's time (A93), and reaching 10° by 1820 hours ship's time (A94).

: Captain Serra claimed to have ordered the engine room to activate the pumps in an attempt to free hold No. 2 of water on January 20th at 2200. Although this is recorded in the deck log, there is no corresponding entry in the engine log (Cf. A84 and Exh. 88, p. 34).**

It is no small wonder then, having found the lashing proper and safe and the vessel's records subject to substantial question, that the trial court was unable to make a determination as to what caused the Terex tractor to break loose. Indeed, there was substantial evidence in the trial record to support a finding that the ship's own conduct was the cause of the casualty. In addition to those facts enumerated above, there were other instances of mismanagement, any one or a combination of which may have caused the casualty.*** *Hurdich* v. *East Mount Shipping Corp.*, 503 F.2d 397, 402 (2nd Cir. 1974).

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* Annex II, infra.

** Annex III, infra.

*** E.g., mysterious reductions in speed to bare steerageway; unexplained presence of water in No. 2 hold; excessive rolling and pitching under the prevailing weather conditions; inexplicable listing of the vessel which ultimately reach 10° to starboard.

POINT III

The Trial Court properly applied the standard of workmanlike performance.

Under Point II of its brief, appellant argues that the trial court erroneously applied the concepts of negligence rather than the duties imposed by the warranty of workmanlike service. The sole basis of this argument is that the court could not find what caused the tractor to break loose and, therefore, it concluded that appellant had not met its burden of proving the cause. However, this argument ignores the governing principals of contractual indemnity as outlined in *Garner* v. *City Service Tankers Corp.*, (5th Cir. 1972), 456 F.2d 476, 481, where the court stated:

> "The determination of whether contractual indemnity should be allowed involves a weighing process evaluating the conduct of both parties to determine:
>
> (1) Whether the warranty of workmanlike performance was breached;
>
> (2) Whether that breach proximately caused the injuries; and
>
> (3) Whether the shipowner's conduct prevented the workmanlike performance."

The trial court's finding that it could not determine what caused the tractor to break loose was simply its response to the question of proximate cause. Its conclusion that appellant had not met its burden of proving the cause demonstrated the court's awareness of the rule that a shipowner seeking contractual indemnity must establish the elements of its claim by a preponderance of the credible evidence. (See cases cited, p. 9 *supra*)

Appellant cites various decisions on pp. 5-7 of its brief concerning the contractual warranty, but their facts are distinguishable from the instant case. In each of the cases cited, there was a finding that the marine contractor had either been negligent or had not properly and safely performed his service. Here, there was no such finding.

In view of the substantial evidence of Amazonia's mishaps and appellant's mismanagement with respect thereto, it is ironic that appellant should cite the rule enunciated in *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324, that the burden should fall on the party which was best able to prevent the casualty. Aside from the fact that appellant permitted the vessel to sail in a "stiff" condition, it was in exclusive control of Amazonia from the time it departed New York at 2125 on January 18th until 2200 on January 20th when the vessel's crew allegedly discovered flooding in No. 2 hold. The trial record discloses that the vessel's crew failed to take any steps to ensure that the cargo remained secure.

Certainly, time is a factor on the issue of whether one party or the other was in the best position to avoid the casualty. This very issue was presented to the court in *Hurdich* v. *East Mount Shipping Corp.*, 502 F.2d 397 (2nd Cir. 1974). Whether knowledge of a hazardous condition should preclude recovery, the court stated at p. 402:

> "We believe the proper resolution of that open question is obvious when the shipowner's actual knowledge of the dangerous condition is aggravated by the fact that it is the only party which over an extended period of time directly preceding the accident could have taken the corrective measures necessary to reduce or eliminate the risk of injury."

POINT IV

Answers to interrogatories are not conclusively binding.

Appellant argues that the trial court ignored a "sworn admission" that the tractors were improperly lashed, based upon an answer to an interrogatory signed and verified by appellee's president, Daniel Devaney, in 1973.

The answer set forth Mr. Devaney's understanding at the time, of how the tractors were secured and what materials were used, based upon documents and records contained in Export's files. Devaney did not have percipient knowledge of the manner in which the New York cargo was secured because he did not go aboard the vessel in New York. His information was derived solely from hearsay.

Appellant's characterization of Mr. Devaney's answer to the interrogatory is wholly misstated (Appellant's brief, p. 10). Devaney's answer contains *no statement* as to the absence or presence of blocking under the axles or to the direction in which the wire lashings led. Thus, there is no basis for appellant's contention that the answer contains a "proven admission of faulty lashing."

As stated *infra*, p. 10, Mr. D'Ambrosio, Export's foreman in charge of securing the tractors, testified at length on the trial. Any difference between the answer given by Mr. Devaney to the interrogatory and the foreman's firsthand description is merely one of detail.

Mr. D'Ambrosio was interviewed at his home in 1975 by appellant's counsel (A213, 219-220). Appellant knew beforehand what D'Ambrosio's trial testimony would be and, therefore, was not misled by the answer to the interrogatory, nor was there any effort on appellee's part to know-

ingly conceal D'Ambrosio's anticipated trial testimony (A219-220; FRCP Rule 26(e)(2)(b)).

The trial court had the opportunity to observe the demeanor of D'Ambrosio on lengthy examination and extensive cross-examination. It weighed Devaney's answer to the interrogatory together with other evidence, particularly D'Ambrosio's testimony, and accepted D'Ambrosio's testimony as the best evidence.

The difficulty with appellant's argument is that it assumes that the trial court was bound to accept Mr. Devaney's version and reject entirely the testimony of D'Ambrosio. It equates answers to interrogatories with sworn admissions made in response to a notice to admit. An answer to an interrogatory is no more formal than any other evidence. *Moran Towing Co.* v. *Gammino Construction Co.,* (1st Cir. 1966) 363 F.2d 108, 111, footnote 3.

In summary, the trial court was under a duty to and did weigh Mr. Devaney's answer, Mr. D'Ambrosio's live testimony and the other evidence. A similar situation arose in *Victory Carriers, Inc.* v. *Stockton Stevedoring Co.,* (9th Cir. 1968), 388 F.2d 955, 959, and the court outlined this duty:

> "An answer to an interrogatory is comparable to answers, which may be mistaken, given in deposition testimony or during the course of the trial itself. Answers to interrogatories must often be supplied before investigation is completed and can rest only upon knowledge which is available at the time. When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict."

CONCLUSION

The judgment below should be affirmed.

Dated: New York, N.Y.
December 6, 1976

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N.

NEW YORK SUPREME COURT APPELLATE DIVISION DEPARTMENT

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

FOOTNER & CO INS

VS

A SS. AMAZONIA

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

AFRIM HASKAJ, being duly sworn,

deposes and says that he is over the age of 21 years and resides at 1481 42nd st, Bklyn NY

That on the 13th day of January, 1977 at

he served the annexed brief for appellee N.J. Export Marine Carpenters Inc upon

Cochanowitz & Callen, 80 Broad Street, NY, NY

in this action, by delivering to and leaving with said attorneys

three true cop thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said

Deponent is not a party to the action.

Sworn to before me, this 13th day of January, 1977

Afrim Haskaj

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Folha "B"

DATA: 22 de Junho de 1971

Situação do navio às 00,00 HORA Navegando no Canal de Moçambique com destino ao de Roma.

[1] HORA CIVIL	RUMO [2] Verdo	[3] Giro	[4] Padrão	[5] Governo	ODOMETRO [6] Fundo	[7] Barca	[8] R. P. M.	[9] BARÔMETRO	TERMOMETRO [10] Sêco	[11] Úmido	VENTO [12] Dir.	[13] Intens.	[14] EST. DO MAR	NUVENS [15] Esp.	[16] Quan.	[17] VISIBILIDADE	[18] EST. ATM.	[19] METEOROS	[20] OBSERVAÇÕES
01	135°	135°	149°	135°	2455.1	-	160	1013	-5°C	-5°C	NW	3	3	K	4	8	4	0	
02	135°	135°	149°	135°	2466.2	-	160	1013	-5°C	-5°C	NW	3	3	K	4	8	4	0	
03	135°	135°	149°	135°	2484.0	-	160	1013	-5°C	-5°C	NW	3	3	K	8	8	2	0	
04	135°	135°	149°	135°	2499.6	-	160	1013	-5°C	-5°C	NW	3	3	K	9	8	2	0	
05	135°	135°	149°	135°	2515.2		160	1014	-4°C	-3°C	NW	3	3	K	4	8	2	0	
06	135°	135°	149°	135°	2530.5		160	1013	-4°C	-3°C	NW	3	2	K	8	7	2	0	
07	135°	135°	149°	135°	2540.4		160	1013	-1°C	-1°C	NW	3	3	K	7	7	1	ch	
08	135°	135°	149°	135°	2550.2	-	160	1013	-1°C	-1°C	NW	3	3	K	7	7	1	ch	
09	135°	135°	149°	135°	2577.8	-	160	1016	-1°C	-1°C	NW	3	3	KN	9	5	2	mt	
10	135°	135°	149°	135°	2591.4	-	120	1016	01°C	00°C	NW	3	3	KN	9	1	2	mt	
11	135°	135°	149°	135°	2606.9	-	160	1016	01°C	00°C	NW	3	3	KN	9	6	2	mt	
12	135°	135°	149°	135°	2622.7	-	160	1016	01°C	00°C	NW	3	3	KN	9	6	2	0	
13	135°	135°	149°	135°	2637.7	-	160	1016	05°C	04°C	NW	3	3	KN	9	4	2	m	
14	135°	135°	149°	135°	2651.4	-	160	1012	05°C	04°C	N	3	3	KN	10	9	2	mb	
15	135°	135°	149°	135°	2666.1	-	160	1013	05°C	04°C	N	3	3	KN	20	2	2	mb	
16	135°	135°	149°	135°	2681.2	-	160	1013	06°C	05°C	N	3	4	KN	10	2	1	mb	
17	135°	135°	149°	135°	2696.1	-	160	1011	06°	05°C	N	3	4	KN	10	1	2	mt	
18	135°	135°	149°	135°	2710.7	-	160	1010	08°	07°	N	3	4	KN	10	1	1	mb	
19	135°	135°	149°	135°	2724.7	-	160	1009	10°	09°	N	3	4	KN	10	1	1	mb	
20	135°	135°	149°	135°	2739.0	-	160	1008	10°	09°	N	3	4	KN	10	1	1	mb	
21	090°	090°	110°	090°	2753.7	-	120	1008	10°C	09°C	NE	6	5	KN	10	1	2	mt	
22	090°	090°	110°	090°	2768.4	-	VAR.	1006	10°C	09°C	NE	6	5	KN	10	1	2	mt	
23	090°	090°	110°	090°	2785.8	-	VAR.	1006	08°	07°C	NE	6	6	KN	10	1	2	mt	
24	090°	090°	110°	090°	2797.3	-	VAR.	1006	08°	07°C	NE	6	6	KN	10	1	2	mt	

DADOS AO MEIO DIA

	EXISTENTE	CONSUMIDO
COMBUSTÍVEL	688.0	12.0
LUBRIFIC. Diesel	8.200 170.0	2.0
ÁGUA	187.0	3.0

RAIO DE AÇÃO RESTANTE:

EM VELOC. ECONÔMICA: 4 dias

FUSO HORÁRIO ÀS 12 HORAS: 05 (W)

POSIÇÃO DO NAVIO

LATITUDE N	LONGITUDE
Estimada: 37°58'	Estimada: 010
Observada: —	Observada: —

CORRENTE

Direção: NW Velocidade: 1.0

Singradura últimas 24 horas 213.

RUBRICA DO ENCARREGADO DO LIVRO

RUBRICA DO CAPITÃO

ANNEX I -- Excerpt From Deck Log, page 113 (Exhibit 16)

116

TRANSLATION 92

from:

watch from 1200 to 1600. At 1500 engines slow speed ahead x x x 2, 3 x x x 4. ~~Extensive rolling~~ Maximum roll noted during the watch 20° starboard x x x 5 x x x 6. At 1800 made an inspection of holds 1, 2, and 3, not finding anything out of order x x x 7 - 10 x x x 11. Hydraulic manual rudder in operation x x x 12 - 21 x x x 22. During the course of the reinforcing of the lashings of the containers stowed on starboard deck, the ship's boy Carlos Albuquerque Leité had an accident, due to a lurch of the sea, he was thrown from the hatch of hold 3 onto the deck. The said crew member was immediately treated with the resources of the ship's infirmary x x x 23 - 25 x x x 26. Vessel navigating with engine at slow speed. At 1800 the crew of the vessel completed the job of reinforcing the lashing of the containers and starboard cranes, there then having been carried out an inspection in holds 1, 2 and 3, finding nothing abnormal. Very rough sea without any one direction, the best bow for steering and rolling being at 120° x x x 27. Ship's routine followed x x x 28, 29 x x x 30. To the First Mate António M. da Silva Jr. x x x Signature.

Watch from 2000 to 2400: 1. As at the end of the watch from 1600 to 2000. Sailing with engine at slow speed ahead x x x 2, 3 x x x 4. ~~Extensive rolling~~ Maximum roll of the ship noted during the watch 20° starboard x x x 5 x x x 6. About 2200 effected an inspection in holds 1 and 3, finding them watertight and hold 2 was making water. x x x 7 - 10 x x x 11. 2000 connected radar, disconnecting it at 2100. Hydraulic manual rudder in

Annex II -- Excerpt from Deck Log translation, p. 92 (Exhibit 87)

from:

Watch from 1600 to 2000 on January 20, 1971. Received the watch with the vessel on voyage from New York with destination Port of Recife. Main engine operating normally. At 1630 the main engine changed to burning of diesel oil. At 1628 half speed ahead. At 1707 slow speed ahead. Generators Nos. 1 and 2 in parallel supplying light and power for the entire vessel. Provisions refrigerator operating under automatic system maintaining the proper temperatures in the chambers. Soundings at 2000: well, 0.95 meters; tank 6, 1.17 meters; diesel oil day tank, 3600; counter 9070150; R.P.M. 117.6. Recovery boiler in normal operation. Pumps and other auxiliaries in normal condition. Turned the watch over without any abnormalities with the vessel burning diesel oil. S/Signature Illegible

Watch from 2000 to 2400 on January 20, 1971. Received the watch with the vessel traveling with destination to the Port of Recife. Main engine burning diesel oil and with the speed reduced. Recover boiler in operation, producing steam for the firing system of the main engine. Provisions refrigerator under automatic control, maintaining the desired temperatures in the chambers. Auxiliary engines Nos. 1 and 2 in parallel. Turned over this watch with speed reduced to dead slow. Tank 6 1.05 meters; well, 0.95 meters; counter 9094920. Thus, turned over. S/Signature Orlando Goncalves Anzier

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Annex III -- Excerpt from Engine Log Translation, p. 34 (Exhibit 88)

a translation of message 24.

THE INTERPRETER: "As of yesterday, 2000 hours, wind and sea force 8, lashing two containers main deck split being relashed and cargo hold out of place."

MR. CONROY: The cargo in the hold is out of place?

THE INTERPRETER: In the hold, yes.

(Continuing) "Navigating with list degrees. No number, just degrees. Stop. Weather tending to improve, position 1400 hours, latitude 34.42 north, longitude 66.50, course, 120, speed, 15, rolls 30 degrees and we expect the possibility of damage to cargo stop. We may possibly need a shore crane Port of Recife in case we are not able to right the vessel stop. Everything all right on board. Captain Serra."

MR. CLEVELAND: Thank you.

BY MR. CONROY:

Q Captain, at that time did you reduce the vessel's speed?

A What time are you asking?

Q At 2200.

A Engines were at half speed, slow half speed.

Q I refer you to the page for January 20th